78-1882

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 76-496

BENSON A. WOLMAN, *et al.*,

Appellants,

—v.—

FRANKLIN B. WALTER, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JURISDICTIONAL STATEMENT

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-vs-
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Appellees.

On Appeal From The United States District Court For The Southern District of Ohio, Eastern Division

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JURISDICTIONAL STATEMENT

Appellants (plaintiffs in the court below) appeal from the order of the United States District Court for the Southern District of Ohio, Eastern Division, entered by a three-judge court on March 21, 1979, denying plaintiffs' motion for a mandatory injunction requiring the defendant-appellees to terminate the loan of equipment and

materials purchased with state funds for use in parochial schools pursuant to Ohio Revised Code §§ 3317.06(B) and 3317.06(C). Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The order and opinion below are not reported. They are set out in the Appendix, infra, pp. A1-A4.

JURISDICTION

This appeal arises from proceedings on remand to the District Court from this Court's decision in Wolman v. Walter, 433 U.S. 229 (1977).

On June 24, 1977, this Court rendered its opinion, in Wolman v. Walter, supra, that Ohio Revised Code § 3317.06, which provided assistance to private sectarian education in Ohio, was partially invalid under the Establishment Clause. Among the programs struck down was the loan of materials and equipment purchased with tax funds to pupils enrolled in nonpublic

schools or to their parents, pursuant to §§ 3317.06(B) and (C). This Court partially affirmed and partially reversed the decision of the three-judge district court which had upheld the entire statute on July 21, 1976. This Court's order, entered June 24, 1977, remanded this case to the District Court for further proceedings in conformity with this Court's opinion of that date.

On February 1, 1978, the three-judge court entered its initial judgment on remand (a copy of which is appended at pp. A5-A7, infra). It declared the partial invalidity of § 3317.06 and permanently enjoined the future expenditure of funds under the invalid portions of the statute. The District Court expressly refrained from deciding whether the equipment or materials already on loan and in the possession of the sectarian schools should be returned, specifically reserving jurisdiction to entertain further applications for relief on this issue.

On February 28, 1978, the appellants submitted a motion for a mandatory injunction to compel the return of the equipment and materials to the public so as to terminate the unconstitutional loans. This

motion was considered by the same three-judge panel which rendered the initial judgment in this case. On March 21, 1979, that three-judge court announced its opinion and order denying the injunction. Appellants filed their notice of appeal to this Court on April 18, 1979 (A18).

Jurisdiction of this appeal is conferred by 28 U.S.C. §§ 1253 and 2281 (in effect with respect to matters commenced prior to August 12, 1976, § 7 of Pub. L. 94-381). Standing is established under Flast v. Cohen, 392 U.S. 83 (1968).

STATUTE INVOLVED

Section 3317.06 was signed into law on August 29, 1975. Subsection (B) of the statute authorized school districts "to purchase and to loan to pupils attending nonpublic schools . . . or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program." Subsection (C) is similarly

worded, but authorized the lending of "equipment" rather than materials. The statute, as reenacted in 1978, with Subsection (B) and (C) unchanged, is appended at pp. A8-A14, infra.

QUESTION PRESENTED

After this Court has held that publicly funded loans of instructional equipment and materials for use in private sectarian schools violate the Establishment Clause, does a District Court abuse its discretion and commit constitutional error when it refuses to enjoin such loans, where the plaintiffs promptly and diligently sought injunctions against the implementation of the unconstitutional program, and where the private schools incurred no detrimental reliance?

STATEMENT OF THE CASE

This action was commenced on November 18, 1975, shortly after the enactment of § 3317.06. The defendants include the Superintendent of Public Instruction, who is the chief executive and administrative officer of the State Department of Education

and the chief administration officer of the State Board of Education; the State Board of Education; the Treasurer and the Auditor of the State of Ohio; the Board of Education of the City School District of Columbus, Ohio; and the parents of several pupils enrolled in sectarian nonpublic schools in the state.

On December 10, 1975, the District Court granted the plaintiffs' motion for a temporary restraining order (modified by consent on February 13, 1976, to permit textbook loans). The order restraining expenditure of funds for the loan of equipment and material remained in effect until the Court below entered judgment for the defendants on July 21, 1976. On July 28, 1976, plaintiffs moved in the District Court for reinstatement of the injunction pending review by this Court. That motion was denied on August 5, 1976. Further applications for injunction pending an appeal to this Court were denied by Mr. Justice Stewart on August 19, 1976 and by Mr. Justice Marshall on August 25, 1976.

THIS COURT'S RULING ON LOANS OF EQUIPMENT AND MATERIAL

In Wolman v. Walter, 433 U.S. 229 (1977), this Court struck down 3317.06(B) and (C), holding that, notwithstanding the channeling of the loaned materials and equipment to pupils and parents, which distinguished these programs from those previously invalidated, "the program is in substance as before. . ." Id. at 250. "In view of the impossibility of separating the secular education function from the sectarian, the state aid inevitably flows in part in support of the religious role of the schools." Id. Accordingly, this Court held that "the loan . . . had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." Id. (Emphasis added).

THE MOTION FOR AN ORDER COMPELLING RETURN OF EQUIPMENT AND MATERIALS

The motion for mandatory injunction, the denial of which is the basis of this appeal, contained three separate requests for relief.

First, the motion demanded that the Columbus Board of Education be required to terminate all outstanding loans and recover possession of the materials and equipment on loan within its city school district. Second, it demanded that the defendant Superintendent of Public Instruction and the State Department of Education be ordered to rescind the guidelines authorizing the loans, account for the funds expended and loans made, and adopt guidelines for the termination of outstanding loans and restoration of the loaned materials and equipment. Third, it demanded that the State Auditor and the State Treasurer be required to take all steps within their authority to recover for the state treasury the value of the loaned property, and specifically that the Auditor, in his next regular audit of the school districts, be required to ascertain and assure that the loaned property was restored to public custody and possession. A copy of the motion is appended at pp. A15-A17, infra.

THE RULING BELOW

The court below construed Appellants' motion for termination of the impermissible

loans as a demand for "retroactive relief" (App. p. A4). While the District Court's opinion made passing reference to the conclusion that "with the exception of the Columbus School Board, the defendants are not the most appropriate parties for achieving the physical return of the materials and equipment" (App. p. A3), it ultimately grounded its opinion on three factors which it deemed to militate against "retroactive relief": (a) the equipment to be returned was subject to "eventual obsolescence" (id. at A4); (b) the "denial of retroactive relief" would "obviate any risk of unconstitutional entanglement with nonpublic school personnel by public officials" (id. at A4); and (c) the materials loaned to the sectarian schools were duplicative of such items available in the public schools, so that, presumably, there would not be much point in making the sectarian schools return the equipment (id. at A4). There was no factual record to support any of these conclusions. Permitting the loans to remain outstanding is constitutionally invalid.

THE QUESTION IS SUBSTANTIAL

I. The Relief Sought Is Not Retroactive; The Denial of the Injunction Converts An Unconstitutional Loan Into a More Flagrantly Unconstitutional Grant.

Contrary to the characterization by the District Court, there is nothing "retroactive" about returning loaned property to the lender when a loan has ended. Indeed this is the normal termination of a loan and the usual expectation of the parties, if they are in good faith. This feature, in gratuitous transactions, normally distinguishes a loan from a gift or a grant. The drafters of § 3317.06 must have determined to lend materials rather than to give them to the parochial institutions because they mistakenly believed a loan to be more likely to withstand First Amendment scrutiny. The District Court's refusal to compel the defendants to end these loans after this Court's holding makes permanent a form of aid to religion which this Court refused to permit even on a temporary basis--in effect, it converts these loans to outright gifts of instructional materials

and equipment to the sectarian schools where they are housed.

This mandatory injunction is in no sense similar to the retroactive relief this Court considered inappropriate in Lemon v. Kurtzman, 411 U.S. 192 (1973) (Lemon II). In that case, state reimbursement to parochial schools for secular educational services in the 1970-71 school year was permitted notwithstanding this Court's ruling in Lemon v. Kurtzman, 403 U.S. 602 (1971) (Lemon I) in June, 1971, that such reimbursements violated the Establishment Clause. The reimbursement was clearly for a period prior to the invalidation of the outstanding program. In the present case, the continuation of the outstanding loans is an ongoing violation. Cf. New York v. Cathedral Academy, 434 U.S. 125, 134 (1977).

II. Equitable Considerations Require, Rather Than Prevent, The Termination of The Equipment and Material Loans.

In Lemon II, the consideration this Court found inimical to retroactive relief was "expenses incurred by the schools in reliance on the state statute inviting the

contracts made and authorizing reimbursement . . ." 411 U.S. at 203. The significance of this reliance by defendants was reinforced by plaintiffs' "tactical choice not to press for interim injunctive suspension of payments or contracts. . ." Id. at 204.

In the present case, there was no detrimental reliance. The sectarian school systems had no reason to expect that the lending programs would be perpetual. They incurred no significant expense in accepting the loans. Appellants repeatedly sought interim relief, from the inception of this litigation through review by this Court. Further, the programs at issue here were sufficiently similar to those invalidated in Meek v. Pittenger, 421 U.S. 349 (1975) to place all concerned on notice of the strong possibility that they would be struck down.

Requiring the return of the materials and equipment on loan causes no inequity to the parochial schools or those who attend them. The basic inequity in the District Court's decision is that it permits the state to give religious institutions that which the First Amendment

prohibits the state even to lend them.[1/]

In New York v. Cathedral Academy, 434 U.S. 125 (1977), this Court rejected the idea that Lemon II stands for the proposition that "every unconstitutional statute, like every dog, gets one bite. . ." Id. at 130. The Cathedral Academy opinion noted that the reimbursement continued in Lemon II was not per se violative of the Establishment Clause; rather, by the time of Lemon II, the excessive entanglement was held to have already occurred and therefore could not be undone by withholding final reimbursement for programs conducted prior to their invalidation.

The present case presents an opposite pattern. Under the Ohio program of loans of equipment and materials, there were no entangling safeguards. The loans themselves constituted impermissible aid to the religious segment of the curriculum

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[1/] The conclusion of the District Court that the equipment and materials duplicate those in the public schools does not affect the equity of requiring them to be returned. Such items could be sold for the benefit of the public.

which, as in Meek v. Pittenger, 421 U.S. 349 (1975), is inextricably intertwined with the balance of the program. Id. at 366. In other words, the loans themselves violate the First Amendment. Unlike the excessive entanglement presented in Lemon II, this impermissible aid to religion is ongoing. It easily can be ended by terminating the loans. Like the reimbursement scheme held properly enjoined in New York v. Cathedral Academy, supra, the continuation of the loan programs in this case "amounts to a new and independently significant infringement of the First and Fourteenth Amendments." 434 U.S. at 134.

III. The Proper Defendants Are Before The Court; Effective Relief Can Be Granted.

A. The defendant Columbus Board of Education can be compelled to collect the materials and equipment.

The District Court, even while expressing the view that the named defendants generally were not best suited to achieving the physical return of the equipment and materials, acknowledged that this observa-

tion did not apply to the Columbus Board of Education. App. p. A3. Had the opinion below turned on the sufficiency of the parties, rather than on equitable considerations, the District Court would evidently have granted the requested relief against the Columbus Board of Education. As the direct lender of the equipment and materials outstanding in the parochial schools within the Columbus City School District, this defendant is in a position to call its loans. There is no impracticality in requiring it to do so.

B. The state officers who are defendants have the authority to implement the termination of the loan of equipment and materials.

The State Auditor routinely audits the boards of education pursuant to Ohio Revised Code Sections 117.09 and 117.10. The biennial inspection provision applies to boards of education. See, e.g., State ex rel. Board of Education v. Board of Education, 65 Ohio App. 273, 29 N.E.2d 878 (Montgomery, 1939). The auditor's Bureau of Inspection and Supervision of

Public Offices has the duty to report on the status of the accounts of all public offices; the report must describe "any public property converted or misappropriated." Ohio Revised Code § 117.10. Appropriate civil actions must be commenced for the recovery of any such property. Id.

An order requiring the State Auditor to treat the equipment and materials in the custody of nonpublic elementary and secondary schools as public property subject to the accounting, reporting and recovery procedures of his office would constitute an effective statewide remedy for the continuing violation of the First Amendment involved in this case.

The defendant State Board of Education also possesses broad statutory authority sufficient to end the unconstitutional loans. The State Board of Education has authority to formulate policy for the public schools. Ohio Revised Code § 3301.07(A). It is required to "administer the educational policies of this state relating to . . . instructional material building and equipment. . ." Ohio Revised Code § 3301.07(B). It may "prescribe. . . systems of accounting" and "may require

county auditors and treasurers, boards of education, clerks of such boards, teachers and other school officers and employees, to file with it such reports as it may prescribe relating to . . . funds, or to the management and conditions of such funds." Ohio Revised Code § 3301.07(C).

The District Court failed to explain its conclusion that these defendant state officers are not those defendants best suited to achieve the return of the loaned public property. It would seem preferable and more efficient to require these state officers to take appropriate steps to recover the loaned property, rather than to attempt direct judicial enforcement of a federal injunction against every local school board and every parochial elementary and secondary school within Ohio.

Because of the refusal of the District Court to order the defendants to terminate the outstanding loans, the school authorities have had no occasion to demand that the bailees of the equipment and materials return them, and the sectarian institutions holding this property have had no occasion to tender it back to the public. It is premature to assume, as the court below

evidently implied, that process must be sought against each person with custody of an item of loaned material or equipment. If the state officers who are defendants in this action are ordered to cause the termination of these loans, the property on loan will be returned to the public school districts in an orderly manner. The private educational institutions which are holding the materials and equipment are presumably law-abiding organizations.

In short, the defendants had ample authority to put the unconstitutional lending scheme into effect; they were adequate defendants for the adjudication of its Establishment Clause invalidity; and they have the power and authority to end that scheme now that it has been held unconstitutional. They should be ordered to do so. The District Court's refusal to enter such an order presents an important question concerning the discretion of a District Court to decline to enjoin clear violations of the Establishment Clause.

CONCLUSION

For the foregoing reasons appellants respectfully urge the Court to note jurisdiction and grant plenary review of this appeal.

Respectfully submitted,

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Dated June 14, 1979

Appendices

OPINION AND ORDER IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

No. C-2-75-792

BENSON A. WOLMAN, et al.

Plaintiffs,

-vs-

MARTIN W. ESSEX, et al.

Defendants.

This matter is before the Court on the plaintiffs' motion for the issuance of a mandatory injunction (1) requiring the Columbus Board of Education to recover possession of all items of equipment and materials presently on loan pursuant to § 3317.06(B) and (C), O.R.C., to pupils attending non-public schools throughout the State of Ohio, (2) requiring the Ohio Board of Education and its officials to promulgate guidelines governing the restoration of such property to the public school districts of the state, and to make an accounting of all monies expended and loans made pursuant to the loan statutes, and (3) requiring defendants Donahey and Ferguson, the Treasurer and Auditor of the state respectively, "to take all steps within their lawful authority and power to recover to the treasury of the State of Ohio the value of all property now on loan to pupils attending non-public schools." The defendants have filed memoranda in opposition to the motion.

Shortly after this action was initially filed, this Court entered a temporary restraining order enjoining the named defendants from expending any funds or otherwise implementing any aspect of §3317.06, O.R.C. Subsections (B) and (C) of that statute authorized the local school districts to lend secular instructional material and equipment to non-public school children or to their parents. With a modification not pertinent here, the injunction remained in effect until July 21, 1976 when this three judge court ruled that the statute was in all respects constitutional.

On June 24, 1977, the United States Supreme Court, on appeal, affirmed in part and reversed in part that ruling, finding specifically that §3317.06(B) and (C) were unconstitutional as having the primary effect of providing a direct and substantial advancement of sectarian education. Wolman v. Walter, 433 U.S. 229 (1977). Thereafter, on February 1, 1978, this Court declared §3317.06(B) and (C) unconstitutional and permanently enjoined the expenditure of funds and the continuation or implementation of the instructional materials and equipment loan provisions of the statute.

By their motion, plaintiffs apparently seek to recover not only materials and equipment loaned under the statute challenged in this action, but also any equipment loaned pursuant to the predecessor statute declared to be unconstitutional in an earlier action. Wolman v. Essex, Civil Action C-2-73-292 (S.D. Ohio 1976). This Court first concludes that consideration of the plaintiffs' motion must be restricted to the question of recovery of those materials loaned under the particular statute challenged in this action. Questions

relating to the effect of the declared unconstitutionality of the predecessor statute should more properly have been raised in the earlier action. Accordingly, the Court will consider plaintiffs' motion only insofar as it relates to those materials and items of equipment made available to non-public school children pursuant to §3317.06(B) and (C) during the relatively short period that those provisions were in effect.

The crux of the issue presently before this Court is one of the appropriate scope of equitable remedies. In shaping equity decrees, of course, the trial court is vested with broad discretionary power. Lemon v. Kurtzman, 411 U.S. 192, 200 (1973). See also Public Funds for Public Schools of New Jersey v. Byrne, 444 F. Supp. 1228, 1232 (D. N.J. 1978). The United States Supreme Court has held that courts considering retroactive equitable relief of this type sought here are bound to apply traditional equitable principles of "what is necessary, what is fair, and what is workable." Id. (footnote omitted). See also New York v. Cathedral Academy, 434 U.S. 125, 129 (1977). In short, this Court must now weigh the competing interests of all the parties to the action.

At the outset, the Court observes that the defendants joined as parties by the plaintiffs, with the exception of the Columbus School Board, are not the most appropriate parties for achieving the physical return of the materials and equipment. With this in mind, other factors relevant to the consideration of the motion weigh much more heavily against granting the relief sought by the motion.

The equipment sought to be recovered includes such items as projectors, record players, maps, globes and science kits. All these items, it would seem to this Court, are subject to eventual obsolescence. Thus the risk of further impairment of constitutional interests is inherently limited by the passage of time. Moreover, the denial of the retroactive relief sought by the plaintiffs would obviate any risk of unconstitutional entanglement with non-public school personnel by public officials.

Furthermore, the equipment and materials made available to the non-public students and their parents are, in accordance with the statutory scheme, necessarily duplicative of equipment and materials already available in the public schools of each school district. Thus, when balanced against the minimal impairment of constitutional interests, the virtual futility of the retroactive relief sought by the plaintiffs assumes much larger proportions.

On balance, then, and considering all the factors involved, the Court determines that its discretion is better exercised in denying the relief requested by the plaintiffs in this motion. Accordingly, plaintiffs motion for a mandatory injunction is hereby DENIED.

(Signed)

John W. Peck, United States Circuit Judge

Joseph P. Kinneary, United States District Judge

Robert M. Duncan, United States District Judge

ORDER IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

No. C-2-75-792

BENSON A. WOLMAN, et al,

Plaintiffs,

-vs-

FRANKLIN B. WALTER, et al,

Defendants.

This matter is before the Court on remand from the Supreme Court of the United States which on June 24, 1977 announced its opinion and judgment affirming in part and reversing in part said previous judgment of this Court, and remanded this cause to this Court for further proceedings in conformity with its opinion.

On due consideration, judgment is hereby rendered as follows:

A. IT IS ORDERED, ADJUDGED AND DECREED THAT Ohio Revised Code §§3317.06(B) (instructional materials loans), 3317.06(C) (instructional equipment loans) and 3317.06(L) (field trip transporation) are hereby declared violative of the First and Fourteenth Amendments of the Constitution of the United States, and the expenditure of funds of the State of Ohio and the continuation or implementation of the programs authorized by said unconstitutional provisions of Section 3317.06 are hereby permanently enjoined.

B. The injunctions granted herein are binding upon the parties to this action, their officers, agents, servants, employees and attorneys and upon those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

C. Except as set forth above, §3317.06 of the Ohio Revised Code, as in effect on July 21, 1976, on its face, is declared to be in conformity with the requirements of the First and Fourteenth Amendments of the Constitution of the United States. Specifically, the purchase and lending of secular textbooks in accordance with §3317.06(A), speech and hearing diagnostic services in accordance with §3317.06(D), physician, nursing, dental and optometric services in accordance with §3317.06(E), diagnostic psychological services in accordance with §3317.06(F), the supply of standardized tests and scoring services in accordance with §3317.06(J), and the provision of therapeutic services in accordance with §3317.06(G), guidance and counseling services in accordance with §3317.06(H), remedial services in accordance with §3317.06(I), and programs for the handicapped in accordance with §3317.06(K) is declared constitutional.

D. One-third of the costs of this action are hereby taxed against the defendants, and two-thirds of said costs are taxed against the plaintiffs.

E. This Court retains jurisdiction of this matter for the purpose of entertaining such further applications for relief which may be necessary or proper to redress the partial invalidity of §3317.06 of the Ohio Revised Code. Without limiting the generality

of the foregoing, the Court refrains from adjudicating, at this time, the obligation of any person to return or seek the return to the public of materials and equipment presently on loan pursuant to 3317.06(B) or (C), and refrains, at this time, from considering whether such adjudication would be appropriate and within the jurisdiction of this Court in the within action. However, this Court retains jurisdiction to consider these issues and any related issues upon proper application.

(Signed)

John W. Peck, United States Circuit Judge

Joseph P. Kinneary, United States District Judge

Robert M. Duncan, United States District Judge

STATUTE INVOLVED

Ohio Revised Code Section 3317.06

§ 3317.06 Distribution of payments for special programs.

Moneys paid to school districts under division (P) of sections 3317.024 [3317.02.4] of the Revised Code shall be used for the following independent and fully severable purposes:

(A) To purchase such secular textbooks as have been approved by the superintendent of public instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents and to hire clerical personnel to administer such lending program. Such loans shall be based upon individual requests submitted by such nonpublic school pupils or parents. Such requests shall be submitted to the local public school district in which the nonpublic school is located. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district. As used in this section, "textbook" means any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends.

(B) To purchase and to loan to pupils attending nonpublic schools within the district or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

(C) To purchase and to loan to pupils attending nonpublic schools within the district or to their parents, upon individual request, such secular, neutral and nonideological instructional equipment as is in use in the public school within the district and which is incapable of diversion to religious use and to hire clerical personnel to administer such lending program.

(D) To provide speech and hearing diagnostic services to pupils attending nonpublic schools within the district. Such service shall be provided in the nonpublic school attended by the pupil receiving the service.

(E) To provide physician, nursing, dental, and optometric services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the nonpublic school pupil receiving the service.

(F) To provide diagnostic psychological services to pupils attending nonpublic schools within the district. Such services shall be provided in the school attended by the pupil receiving the service.

(G) To provide therapeutic psychological and speech and hearing services to pupils attending nonpublic schools within the district.

Such services shall be provided in the public school, in public centers, or in mobile units located off the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(H) To provide guidance and counseling services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(I) To provide remedial services to pupils attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(J) To supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state.

(K) To provide programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district. Such services shall be provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state department of education. If such services are provided in the public school, or in public centers, transportation to and from such facilities shall be provided by the public school district in which the nonpublic school is located.

(L) To hire clerical personnel to assist in the administration of programs pursuant to divisions (D), (E), (F), (G), (H), (I), and (K) of this section and to hire supervisory personnel to supervise the providing of services and textbooks pursuant to this section.

Clerical and supervisory personnel hired pursuant to division (L) of this section shall perform their services in the public schools, in public centers, or mobile units where the services are provided to the nonpublic school pupil except that such personnel may accompany pupils to and from neutral service sites when necessary to ensure the safety of the children receiving the services.

Health services provided pursuant to divisions (D), (E), (F), and (G) of this section may be provided under contract with the state department of public health, city, or general health districts or other private agencies whose personnel are properly licensed by an appropriate state board or agency.

Transportation of pupils provided pursuant to divisions (G), (H), (I), and (K) of this section shall be provided by the public

school district from its general funds and not from moneys paid to it under division (P) of section 3317.024 [3317.02.4] of the Revised Code unless a special transportation request is submitted by the parent of the child receiving service pursuant to such divisions. If such an application is presented to the local public school district, it may pay for the transportation from moneys paid to it under division (P) of section 3317.024 [3317.02.4] of the Revised Code.

The duties of clerical personnel, hired pursuant to divisions (B) and (C) of this section, shall include distribution of loan request forms, receipt and cataloging of loan requests, inventory of instructional materials and instructional equipment, distribution of instructional materials and instructional equipment to pupils or their parents, retrieval of such instructional materials and instructional equipment, and maintaining custody and storage of these items. The instructional material and instructional equipment authorized to be loaned pursuant to divisions (B) and (C) of this section may be stored on the premises of the nonpublic school of attendance and the clerical personnel hired for administration of the lending program may perform their services upon the premises of the nonpublic school when in the determination of the state department of education, it is necessary and appropriate for efficient implementation of the lending program.

No school district shall provide health or remedial services to nonpublic school pupils as authorized by this section unless such services are available to pupils attending the public schools within the district.

Health and remedial services and instructional materials and equipment provided for the benefit of nonpublic school pupils pursuant to this section and the admission of pupils to such nonpublic schools shall be provided without distinction as to race, creed, color, or national origin of such pupils or of their teachers. No instructional materials or instructional equipment shall be loaned to pupils in nonpublic schools or their parents unless similar instructional materials or instructional equipment are available for pupils in the public schools of the school district.

No school district shall provide services, materials, or equipment for use in religious courses, devotional exercises, religious training, or any other religious activity.

As used in this section, "parent" includes a person standing in loco parentis to a child.

Notwithstanding section 3317.01 of the Revised Code, payments shall be made under this section to any city, local, or exempted village school district within which is located one or more nonpublic elementary or high schools.

The allocation of payments for textbooks, instructional materials, instructional equipment, health services, and remedial services to city, local, and exempted village school districts shall be on the basis of the state board of education's estimated annual average daily membership in nonpublic elementary and high schools located in the district.

Payments made to city, local, and exempted village school districts under this section shall be equal to specific appropriations made for the purpose.

The department of education shall adopt guidelines and procedures under which such programs and services shall be provided, under which districts shall be reimbursed for administrative costs incurred in providing such programs and services, and under which any unexpended balance of the amounts appropriated by the general assembly to implement this section may be transferred to the auxiliary services personnel unemployment compensation fund established pursuant to section 4141.47 of the Revised Code. Within thirty days after the end of each biennium, each board of education shall remit to the department all moneys paid to it under division (P) of section 3317.024 [3317.02.4] of the Revised Code that are not required to pay expenses incurred under this section during the biennium for which the money was appropriated.

Funds distributed pursuant to this section shall not exceed specific appropriations made therefor by the general assembly, unless expressly approved by the emergency board or the controlling board.

[End of Section 3317.06]

MOTION FOR ORDER COMPELLING RETURN OF EQUIPMENT AND MATERIALS IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

No. C-2-75-792

BENSON A. WOLMAN, et al,

Plaintiffs,

-vs-

FRANKLIN B. WALTER, et al,

Defendants.

Plaintiffs respectfully move the Court for an order of mandatory injunction as follows:

(a) requiring the defendant Board of Education of the city school district of Columbus, Ohio to terminate all outstanding loans of equipment and materials to pupils attending non-public schools, or their parents, pursuant to Ohio Revised Code Sections 3317.06(B) and 3317.06(C) (hereinafter sometimes called "loan statutes"), and requiring said Board of Education to recover possession of all items of equipment and materials presently on loan pursuant to the loan statutes; and

(b) requiring the defendants Franklin B. Walter, Superintendent of Public Instruction of the State of Ohio and the State Board of Education to rescind the guidelines of the State Department of Education authorizing the lending of equipment and materials pursuant to the loan statutes, to make an accounting of

all monies expended and loans made pursuant to the loan statutes, and to adopt guidelines for the termination of such loans and the restoration to the public school districts of the State of Ohio of all property presently on loan pursuant to the loan statutes; and

(c) requiring the defendants Gertrude W. Donahey, Treasurer of the State of Ohio, and Thomas E. Ferguson, Auditor of the State of Ohio to take all steps within their lawful authority and power to recover to the treasury of the State of Ohio the value of all property now on loan to pupils attending non-public schools, or their parents, pursuant to the loan statutes; without limiting the foregoing demand for relief, requiring the defendant Thomas E. Ferguson, Auditor of the State of Ohio, in the course of his next regular audit of each of the school districts of the State of Ohio, to ascertain and assure that all property belonging to the State and/or School District and which may have theretofore been loaned pursuant to the loan statutes has been restored to the custody and possession of the Board of Education.

A memorandum in support of this motion is attached.

Respectfully submitted,

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NOTICE OF APPEAL IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

No. C-2-75-792

BENSON A. WOLMAN, et al,

Plaintiffs,

-vs-

FRANKLIN B. WALTER, et al.,
(formerly Martin W. Essex, et al.),

Defendants.

Notice is hereby given that the plaintiffs hereby appeal to the Supreme Court of the United States from the final judgment and order denying plaintiffs' motion for mandatory injunction entered in this action on March 21, 1979, by a district court of three judges.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

Case No. 78-1882

BENSON A. WOLMAN, et al.,

Appellants,

vs.

FRANKLIN B. WALTER, et al.,

Appellees.

On Appeal From The United States District Court
For The Southern District Of Ohio, Eastern Division

MOTION OF STATE APPELLEES TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

Case No. 78-1882

BENSON A. WOLMAN, et al.,

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vs.

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Appellees.

On Appeal From The United States District Court
For The Southern District Of Ohio, Eastern Division

MOTION OF STATE APPELLEES TO DISMISS OR AFFIRM

Defendants-appellees, Franklin B. Walter, Superintendent of Public Instruction; the State Board of Education; Gertrude W. Donahey, Treasurer of Ohio; and Thomas E. Ferguson, Auditor of Ohio (the state defendants herein), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully move to dismiss the appeal from or, in the alternative, affirm the judgment of the District Court.

QUESTIONS PRESENTED

1. Whether a taxpayer may invoke the jurisdiction of this Court to resolve a dispute in which he has no financial interest.

2. Whether it is an abuse of discretion for a trial court to refuse to issue a mandatory injunction to compel state officials to obtain possession of instructional materials and equipment and turn them over to local school districts where such local school districts have shown no interest in such materials and equipment.

STATEMENT OF THE CASE

On February 1, 1978, the three-judge District Court, pursuant to the mandate of this Court, declared unconstitutional those portions of Section 3317.06(B) providing for the loan of instructional materials and equipment and transportation for field trips. It enjoined the expenditure of state funds for, and the continuation or implementation of, those programs. The remaining portions of the statute were declared constitutional. A copy of the Order is set forth in the Jurisdictional Statement at A-5.

The plaintiffs filed a motion for a mandatory injunction compelling the Board of Education of the City School District of Columbus, Ohio, and the state defendants to recover possession of the instructional materials and equipment presently on loan pursuant to the statute and restore possession to the local boards of education.

The District Court, by Order filed March 21, 1979, denied the motion. A copy of the Opinion and Order is set forth in the Jurisdictional Statement at A-1.

MOTION TO DISMISS

The state defendants move to dismiss the appeal on the ground that no justiciable case or controversy exists within the meaning of Article III.

Plaintiffs allege that standing is established under *Flast v. Cohen*, 392 U.S. 83 (1968). In that case this Court explained that under certain circumstances a taxpayer may have standing to challenge governmental conduct. In order to do so, the taxpayer must establish a logical connection between both his status as a taxpayer and the challenged conduct and his status as a taxpayer and the nature of the constitutional infringement. *Ibid.* at 102-103.

Plaintiffs are unable to make such a showing in this appeal. There is no connection between their status as taxpayers and the question of who has the right to possession of the instructional materials and equipment. Plaintiffs do not even allege that they will be forced to assume an increased tax burden if the requested relief is denied. *Compare Warth v. Seldin*, 422 U.S. 490, 508-509 (1975). Such a claim would be foreclosed as a matter of law. Any funds which might be derived from such materials and equipment could not be used to lower taxes for the support of public schools. Such funds may only be used to provide special programs for students in non-public schools. Section 3317.06 of the Ohio Revised Code.

The state defendants submit that this appeal is similar to, and should be controlled by, *Doremus v. Board of Education*, 342 U.S. 429 (1952). In that case the plaintiff was a taxpayer who challenged the validity of a statute providing for Bible reading in public schools. This Court dismissed the appeal for lack of jurisdiction, since the taxpayer had no financial interest in the challenged conduct.

> A taxpayer's action can meet this test, [case or controversy] but only when it is a good-faith pocket book action. It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be injured by the unconstitutional conduct. We find no such direct and particular financial interest here. *Ibid.* at 434-435.

Plaintiffs in their Complaint also allege that they are citizens. The complaints of citizens concerning the way their government is conducted are generally not sufficient to create a case or controversy. Where the asserted injury is a generalized harm, shared by all or a large class of citizens, and there is no express statutory right of action, that injury will not warrant the exercise of jurisdiction. *Warth v. Seldin, supra,* 422 U.S. at 499; *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 220 (1974); *United States v. Richardson,* 418 U.S. 166, 180 (1974).

MOTION TO AFFIRM

The state defendants, in the alternative, move that the judgment of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

The District Court, in an attempt to follow the direction of this Court in *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973); and *New York v. Cathedral Academy,* 434 U.S. 125, 129 (1977), to incorporate a "blend of what is necessary, what is fair, and what is equitable," balanced the competing interests involved and found that the request for injunctive relief should be denied.

It pointed out that the denial of such relief would result in only minimal impairment of constitutional interests. The instructional materials and equipment involved are subject to eventual obsolescence. Thus the risk of any further benefit to the non-public schools is inherently limited by the passage of time. In addition denial of relief would further other constitutional interests. It would eliminate any risk of unconstitutional entanglement with non-public school personnel and public officials.

The District Court also pointed out the virtual futility of granting relief. The instructional materials and equipment would be of no benefit to the local school districts since they necessarily duplicate the materials and equipment already available in the public schools.

A trial court is vested with broad discretion in determining the scope and availability of equitable relief and the scope of appellate review of such relief is correspondingly narrow. *Lemon v. Kurtzman, supra,* 411 U.S. at 200.

The state defendants respectfully submit that the denial of relief by the District Court was a proper, if not the only proper, exercise of its discretion.

Plaintiffs in their Jurisdictional Statement have attempted to distinguish the *Lemon case* on two grounds. They claim that the payments of money did not constitute an impermissible aid to religion while the loan of instructional materials and equipment do constitute such aid. They also claim that the continuation of the loan constitutes a "new and independently significant" constitutional violation.

The state defendants recognize that this Court, in *Lemon,* did not decide whether or not the grant of public funds constituted an impermissible aid to religion. They submit, however, the non-recovery of inherently secular educational materials and equipment, which have, or eventually will, become obsolescent, constitutes no greater, if as great an, advancement of the sectarian purposes of non-public schools as a grant of money to such schools to reimburse them for secular educational services.

In both the *Cathedral Academy* and *Lemon cases*, the plaintiffs sought to enjoin the future payment of public funds to non-public schools. The basic difference between the cases was that the District Court in *Cathedral Academy* had enjoined the payment of such funds while the District Court in *Lemon* denied such relief. In *Cathedral Academy* the legislature attempted to overrule the injunction by enacting a new statute providing for the same payment of funds as reimbursement for expenses as a moral obligation. It was the enactment of the new statute that constituted a new and independent constitutional infringement.

The instant case is similar to *Lemon* in that the District Court refused to enjoin the loan of instructional materials and equipment. It differs from the *Cathedral Academy case* in that the state has not attempted in anyway to overrule or evade the ruling of this Court or the injunction of the District Court after remand.

The instant case also differs from both *Lemon* and *Cathedral Academy* in the relief requested. These plaintiffs are seeking not to enjoin the future loan of materials and equipment but to compel the return of materials and equipment previously loaned. No past payments were involved in *Cathedral Academy* and the plaintiffs in *Lemon* did not even seek the return of the money which had previously been paid.

The state defendants submit that the District Court properly weighed the competing interests involved and correctly determined that an injunction should not issue.

The District Court stated that the state defendants were not the most appropriate parties for achieving the physical return of the materials and equipment. Nothing in the Jurisdictional Statement detracts from the validity of that statement.

Plaintiffs allege that the State Auditor has the duty to audit the boards of education and that the State Board of Education has the authority to administer educational policies relating to educational materials and equipment; to prescribe systems of accounting, and require boards of education to file such reports as it may prescribe. This hardly constitutes authority for either the State Auditor or the State Board to recover possession of the instructional materials and equipment.

Plaintiffs do not even attempt to allege any authority on the part of the other state defendants.

The state defendants are also inappropriate parties for another reason. Plaintiffs are asking the court to compel these state officers to perform their official functions in a certain manner. When a plaintiff seeks such affirmative relief against an official, the suit is in effect one against the sovereign and is barred by the Eleventh Amendment. *Dugan v. Rank*, 372 U.S. 609, 620 (1963); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n. 11 and 704 (1974).

Even if the suit is not considered as one against the sovereign, principles of equity and comity would preclude such an unwarranted interference with the state's administration of its own laws. *Rizzo v. Goode*, 423 U.S. 362, 378-380 (1976).

The most inappropriate parties to this action, however, are the plaintiffs. Plaintiffs in effect are asserting the rights of the public school districts of this state. Generally a party will not be permitted to assert the rights of third persons. One reason is that the third person may not wish to assert his rights. He may believe that it is better not to assert them in view of the consequences likely to be entailed. 13 Wright, Miller & Cooper, *Federal Practice and Procedure*, 211-212, Section 3531. This might well be the reason that many, if not all, of the public school districts did not assert their rights in this case. They may believe that, even if they were to prevail on a replevin claim, it would not be economically advantageous to do so.

As the District Court explained, the materials and equipment loaned to the non-public school students duplicates materials and equipment already owned by the public school districts. The public school districts would, therefore, have no use for such materials and equipment in their own schools.

The only way the materials and equipment may be sold by the public school districts is by public auction after thirty days notice. R.C. 3313.41. The market for such materials and equipment is obviously limited. It is likely that the only interested buyers would be the non-public schools. Since no one would be bidding against those schools, the amount realized from the auction would be whatever the non-public schools were willing to pay. That amount might not be sufficient to justify the expense of the appraisal, the publication of notice and the auction.

The refusal of the local school districts to initiate replevin actions, therefore, might well represent their considered judgment that their time and resources might better be used for other purposes. The state defendants submit that it would be particularly inappropriate for a federal court to permit the plaintiffs to substitute their choice for that of the local school districts regarding how best to use their scarce resources to carry out their educational function. *Cf. National League of Cities v. Usery*, 426 U.S. 833, 855 (1976); *San Antonio Ind. School Dist. v. Rodriguez*, 413 U.S. 1, 40-42 (1973).

CONCLUSION

For the reasons stated herein this appeal should either be dismissed or affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1882

BENSON WOLMAN, *et al.*,

Appellants,

v.

FRANKLIN B. WALTER, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio Eastern Division

MOTION TO AFFIRM OF APPELLEES JAMES GRIT, et al.

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BENSON WOLMAN, *et al.*,

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Appellees.

On Appeal from the United States District Court for the Southern District of Ohio Eastern Division

MOTION TO AFFIRM OF APPELLEES JAMES GRIT, et al.

Pursuant to Rule 16(1) of the Rules of the Supreme Court of the United States, the individual appellees move this Court to affirm the decision of the District Court on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF CASE AND FACTS

This action was filed on November 18, 1975 under 28 U.S.C. §§2281, 2284 seeking a declaration that Ohio Revised Code §3317.06 was unconstitutional under the First and Fourteenth Amendments, and requesting an injunction against its enforcement. The District Court subsequently granted the appellants' motion for a temporary restraining order preventing the appellees from enforcing the statute. This injunction remained in effect from December 10, 1975 through July 21, 1976.

The injunction, however, was vacated when the three-judge court unanimously upheld the statute's constitutionality. *Wolman* v. *Essex*, 417 F.Supp. 1113 (S.D. Ohio 1976). Applications for stay pending appeal to this Court were denied by Justice Stewart and Justice Marshall. Thus, the statute, as affirmed by the three-judge Court, was in full force during the 1976-1977 school year. On June 24, 1977, this Court rendered its opinion on the constitutionality of the statute. *Wolman* v. *Walter*, 433 U.S. 229 (1977). While the bulk of the statute was found to pass constitutional muster, the portions related to providing instructional equipment and materials as well as reimbursement for field trips were found to exceed the limits imposed by the First and Fourteenth Amendments.

The case was remanded to the District Court for further proceedings in conformity with this Court's opinion. The District Court entered judgment on the mandate, declared the partial invalidity of the statute, and enjoined its enforcement. (Opinion Reprinted in Jurisdictional Statement at A1-A4.) In short, the District Court granted the appellants the precise relief for which they had prayed in their complaint. Not satisfied with this order, however, the appellants made an additional request that the equipment and materials provided to the nonpublic school pupils prior to this Court's decision be returned to the state. The District

Court, after balancing the competing constitutional equities involved, denied the motion. This appeal followed that denial.

ARGUMENT

The decision of the District Court resulted from the application of well-established principles and was plainly correct. Despite appellants' statements to the contrary, the "problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional." *Lemon* v. *Kurtzman*, 411 U.S. 192, 199 (1973) (*Lemon II*). The appellants are simply asking this Court "to re-examine the District Court's evaluation of the proper means of implementing an equitable decree." *Lemon II* at 199-200. The tests to be applied by the District Court, however, were thoroughly discussed in *Lemon II*, and have been consistently adhered to by this Court. *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 767 n. 23 (1976). The District Court recognized these precedents and explicitly applied them to the present case. In short, the instant case raises no new substantive issues not previously resolved by controlling precedent of this Court. The District Court's decision should be affirmed.

The appellants seek review of the denial of an injunction which would require the return of instructional materials and equipment provided under Ohio Revised Code §3317.06 during the period between the District Court's unanimous decision sustaining the constitutionality of the statute and this Court's decision finding that portions of the statute violated the Establishment Clause. The only issue presented by this appeal, then, is whether the District Court was required to order the return of the materials and equipment.

The proper standard to be applied by the District Court in resolving this issue was established in *Lemon II*. Rather than apply any absolute doctrine of the retroactivity of a constitutional adjudication, the District Court must look to the "practical realities" of each case in determining the proper scope of any requested equitable remedy:

> *In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow.* [Citations omitted.] Moreover, in constitutional adjudication as elsewhere, *equitable remedies are a special blend of what is necessary, what is fair, and what is workable.* "Traditionally, equity has been characterized by a *practical flexibility* in shaping its remedies and by a facility for adjusting and reconciling public and private needs." [Citation omitted.] Mr. Justice Douglas, speaking for the Court, has said,
>
> > "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." [Citation omitted.]
>
> In equity, as nowhere else, courts eschew rigid absolutes and look to the *practical realities* and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots.
>
> [411 U.S. at 200-201 (emphasis added).]

In the present case, the District Court applied this test, balanced the competing interests, and concluded that the "practical realities" of the case required that the appellants' motion be denied:

At the outset, the Court observes that the defendants joined as parties by the plaintiffs, with the exception of the Columbus School Board, are not the most appropriate parties for achieving the physical return of the materials and equipment. With this in mind, other factors relevant to the consideration of the motion weigh much more heavily against granting the relief sought by the motion.

The equipment sought to be recovered includes such items as projectors, record players, maps, globes and science kits. All these items, it would seem to this Court, are subject to eventual obsolescence. Thus the risk of further impairment of constitutional interests is inherently limited by the passage of time. Moreover, the denial of the retroactive relief sought by the plaintiffs would obviate any risk of unconstitutional entanglement with non-public school personnel by public officials.

Furthermore, the equipment and materials made available to the non-public students and their parents are, in accordance with the statutory scheme, necessarily duplicative of equipment and materials already available in the public schools of each school district. Thus, when balanced against the minimal impairment of constitutional interests, the virtual futility of the retroactive relief sought by the plaintiffs assumes much larger proportions.

On balance, then, and considering all the factors involved, the Court determines that its discretion is better exercised in denying the relief requested by the plaintiffs in this motion.

[*Wolman* v. *Essex*, C-2-75-792 (S.D.Ohio, Mar. 21, 1979) set out in Jurisdictional Statement at A3-A4.]

In other words, the practical realities weighed most heavily in favor of denying the appellants' motion. The return of the

materials, to paraphrase *Lemon II*, is not fair, not necessary, and not workable.

The appellants apparently assume that it would be a simple task to send trucks out to the schools, pick up the materials, and then deliver them to the public school children. An assumption that the public school administrators want the materials would in some instances be quite inaccurate. These materials were made available in nonpublic schools only to the extent that they were already available in the public schools. Ohio Revised Code §3317.06(B) and (C). To the extent that the materials are depreciated or border on obsolescence, it would be futile for the Court to order the materials to be given to the public schools. Even if the public school officials in some districts would like to use the repossessed materials, they could not do so because it would be contrary to Ohio law.

The funds received by a political subdivision of Ohio and designated for a limited purpose may only be expended for that purpose:

> All revenue derived from a source other than the general property tax and which the law prescribes shall be used for a particular purpose, shall be paid into a special fund for such purpose.
>
> * * *
>
> Money paid into any fund shall be used only for the purposes for which such fund is established.

[Ohio Revised Code §5705.10.]

See also, Article II, §22 of the Ohio Constitution which requires that no money be expended except pursuant to "a specific appropriation." Local public school boards, as creatures of statute, may only proceed pursuant to explicit statutory authorization. *Perkins* v. *Bright*, 109 Ohio St. 14 (1923); *Schwing* v. *McClure*, 120 Ohio St. 335 (1929). Thus,

funds appropriated to local public school boards by the General Assembly may only be used for the purposes designated in the statute.

In the present case, the statute clearly limits the power of the local public school boards, to whom the funds are given (Ohio Revised Code §3317.024(P)), to utilize the equipment purchased under the statute. The funds are to be used "to purchase and to loan to pupils attending nonpublic schools within the district" instructional materials and equipment. Ohio Revised Code §3317.06(B) and (C). The language of the statute is mandatory: "Monies paid to school districts under subdivision (P) of §3317.024 of the Revised Code *shall be used* for the following independent and fully severable purposes." Ohio Revised Code §3317.06 (emphasis added). Thus, under Ohio law the property may only be loaned to pupils attending nonpublic schools. There is no statutory authorization, and thus no power on the part of the local school board, to use the property for any other purpose. Thus, any property returned under a court order could not be used by the public school districts.

Ohio Revised Code §5705.10 also limits the application of the proceeds obtained from any sale of the loaned materials and equipment:

> Proceeds from the sale of property other than a permanent improvement shall be paid into the fund from which such property was acquired or is maintained, or if there is no such fund, into the general fund.

The sale of materials would be by public auction pursuant to Ohio Revised Code §3313.41. Ohio Revised Code §3317.06 indicates that monies appropriated to the school districts under that statute are to be used for the following "independent and fully severable purposes." Thus, funds allocated under the program may be used for any of the constitutional services provided by the statute. The proceeds from any sale would thus be returned to the funds

held by the public school districts which provide services to nonpublic school pupils which have been declared constitutional by this Court.

A scenario that would follow an order such as that sought by the appellants would go something like this: First, local public school districts (if they were joined as parties) would have to accomplish an inventory of all materials that have been lent to the nonpublic school pupils. This would require on-site inspection and inventory at all of the nonpublic schools and analysis of all of the public school records. Thereafter, a decision would be made with respect to the transportation of all such materials to warehouse storage. The next step would involve the expenditure of public funds for the purpose of advertising and conducting competitive bidding at 616 separate auctions (one each per public school district). When the 616 public auctions are held, the most likely bidders would be the nonpublic schools. Public school districts, by the very nature of things, already have the same materials and equipment, and because it is constitutional to continue to provide them to public school pupils, public funds are available to buy new rather than used, depreciated, or obsolete items.

Thus, we would observe the strange specter of substantial expenditure of public monies for naught. In most instances, the materials would end up where they started out, and the funds derived from public bidding would be required by law to be placed into funds set aside by local school districts to provide constitutional services for nonpublic school pupils. In short, the used materials and equipment would be sold in a distress auction to the same institutions which are presently using them—but only after a costly and difficult repossession and sale. Such a result would not be consistent with traditional principles of equity. Equity has never required the doing of a vain or useless act. *Mitchell* v. *Chambers Constr. Co.*, 214 F.2d. 515, 517 (10th Cir. 1954).

Lemon II made it clear that these kinds of draconian, retrospective decrees, are not required when they are not consistent with traditional equitable considerations.

Perhaps recognizing that the application of *Lemon II* to the present case requires affirmance of the District Court, the appellants' attempt to distinguish *Lemon II*. While that case is important here more for the guidelines that it establishes for District Courts in fashioning equitable decrees than for its specific factual background, the appellants' purported factual distinctions also prove to be unpersuasive. The basic thrust of their argument is that the District Court's decision leaving the materials in the schools permits an ongoing violation of the Establishment Clause and perpetuates entanglement by the public authorities. The appellants argue that the *Lemon II* decision, allowing reimbursement, did not have this result. Jurisdictional Statement at 11, 13-14. This argument is a classic example of a distinction without a difference.

The *Lemon II* court confronted a situation in which funds were paid to sectarian schools to reimburse them for the purchase of "instructional materials for mathematics, modern foreign language, physical science, and physical education courses." *Lemon II* at 194. These items are similar to those provided under the terms of Ohio Revised Code §3317.06(B) and (C). The materials in *Lemon II*, once paid for, remained in the schools just as the materials at issue here would remain available to the children at sectarian schools. This continued availability of materials, however, does not make the District Court's decision invalid as allowing an "ongoing violation," any more than *Lemon II* resulted in an "ongoing violation."

Nor does the District Court's determination result in excessive continued entanglement between state and secular authorities. Indeed, as this Court concluded in *Meek* v. *Pittenger*, 421 U.S. 349, 365 (1975), "the material and

equipment that are the subjects of the loan ... are self policing, in that starting as secular, nonideological and neutral, they will not change in use." Absent retroactive relief, the self-policing, secular materials will remain in place until obsolete. The public lending clerks no longer exist. Continued payment of their salaries would have violated the permanent injunction. In short, governmental entanglement would take place only if appellants' proposed "draconian" order had to be implemented. See *Roemer* at 767, n. 23. As in *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970), the granting of the required relief would "expand the involvement of government ... and the direct confrontations and conflicts that follow in the train of those legal processes."

The appellants' attempted analogy of this case to *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977) fares no better under scrutiny. An analysis of the factual context of *Cathedral Academy* reveals little resemblance between it and the present case. In *Cathedral Academy*, the District Court had struck down a state reimbursement plan for certain expenses. The Court, in fashioning its equitable remedy, ordered that no reimbursement be made even for amounts already paid out. 434 U.S. at 139. Of course, under *Lemon II*, the District Court, after balancing the equities involved, was authorized to enter such an order. The New York legislature, however, chose to enact a statute which provided for reimbursement of the amounts, despite the court's order. The issue before this Court then was whether "a state legislature may effectively modify a federal court's injunction?" *Cathedral Academy* at 130. In short, this Court was reviewing an act of the New York legislature, not a District Court's exercise of its equitable discretion. The decision simply held that nothing in *Lemon II* gave the legislative branches of state government the power to review or modify the decrees of federal courts. The opinion in no

way limited the applicability of *Lemon II* to decisions of federal courts.

CONCLUSION

The "problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional." *Lemon II*, at 199. As such, this case falls squarely within the parameters of *Lemon II* and is controlled by its principles. The District Court properly applied those principles, and, after balancing the constitutional equities, denied the appellants' request for retroactive relief. There is no new substantive constitutional issue involved here, nor is there any question as to the standards applicable to the District Court's decision. The questions upon which the decision of this case depends are simply not substantial

The decision of the District Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1882

BENSON A. WOLMAN, *et al.*,

Appellants,

—v.—

FRANKLIN B. WALTER, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRIEF IN OPPOSITION TO MOTION OF STATE APPELLEES TO DISMISS OR AFFIRM AND IN OPPOSITION TO MOTION TO AFFIRM OF APPELLEES JAMES GRIT, *et al.*

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I. Brief in Opposition to Motion of State Appellees to Dismiss

The State appellees initially challenge plaintiffs' standing under Flast v. Cohen, 392 U.S. 83 (1968). They urge that plain-

tiffs have not alleged that they will be forced to assume an increased tax burden because the funds recoverable pursuant to the plaintiffs' motion must continue to be used for nonpublic school programs (State Appellees' Motion, p. 3). This argument is simplistic. Even if it is true that the materials and equipment unconstitutionally on loan in the nonpublic schools must be sold, and that the proceeds of the sale will again be channeled into other programs for the pupils in those nonpublic schools, that factor does not affect the plaintiffs' standing. The possibility that funds freed from unconstitutional uses as the result of a taxpayers' suit will be directed into other programs rather than refunded to the taxpayers always exists. Standing under Flast can hardly be defeated by the possibility that the total dollars expended by the State on nonpublic education will not decrease as a result of the requested injunction. If the injunction to terminate the outstanding equipment and materials loans is granted, any ultimate rerouting of the equipment and materials or their proceeds will presumably comport with the Establishment Clause.

The State defendants' reliance on Doremus v. Board of Education, 342 U.S. 429 (1952) is misplaced. In Doremus, the taxpayers sued to enjoin a program of Bible reading in the public schools. The allegedly unconstitutional activity was the religious character of the program rather than the expenditure of the dollars per se. If Doremus retains any vitality after Engel v. Vitale, 370 U.S. 421 (1962) and Abington School District v. Schempp, 374 U.S. 203 (1963), that case has no application here. Plaintiffs in the instant case have sued directly for relief against the expenditure of tax dollars for the purchase of equipment and supplies to be loaned for use in parochial schools. Plaintiffs' claim for redress against this First Amendment violation does not lose its pecuniary characteristics when the focus is shifted from enjoining the dollars to be spent in the future to terminating the outstanding loans. Both aspects of the remedy remain pecuniary and the case remains a "pocket-book action."

For the foregoing reasons, the motion of the state appellees to dismiss should be overruled.

II. Brief in Opposition to Motion of State Appellees to Affirm

The State defendants, in the alternative, have moved for affirmance on the ground that the question presented is insubstantial. Inter alia they urge that the instructional materials and equipment are "subject to eventual obsolescence." (State Appellees' Motion to Affirm, p. 4). There is no evidence whatever as to how many years will elapse before the materials will become obsolete, and the prospect of obsolescence suggests that the materials be returned quickly, rather than that the Establishment Clause be flouted. The further point made by these defendants, that the equipment and materials would be of no use to the local school districts because they duplicate materials and equipment already available is contradicted by the position of the intervening defendants that the equipment and materials must be sold so that the proceeds can continue to be deployed for the benefit of pupils in the nonpublic schools. (Motion to Affirm of Appellees James Grit, et al., p. 7).

The State defendants seek to distinguish

New York v. Cathedral Academy, 434 U.S. 125 (1977), by arguing that in Cathedral Academy it was the enactment of a new statute that constituted the new and independent constitutional infringement (Motion of State Appellees to Affirm, p. 5-6). In fact, however, the continuation of the equipment and materials loans under Ohio law is not merely an ongoing program under pre-existing law. In the aftermath of the invalidation of these sections by Wolman v. Walter, 433 U.S. 229 (1977), the General Assembly reenacted sub-sections (B) and (C) in 1978. Accordingly, the identity between Cathedral Academy and the instant case is extremely close. The difference between the enactment of a new unconstitutional statute in Cathedral Academy and the reenactment of an old one in the instant case would not seem to be of constitutional significance.

The State defendants further argue that the present case differs from Cathedral Academy in that the State has not attempted to evade the injunction of the District Court after remand. (Motion to Affirm, p. 6). This argument begs the question since the very issue before this Court is whether the District Court erred in refusing to

order the relief which the State defendants claim they have not attempted to evade.

The State defendants further demur that the statutory provisions cited by the plaintiffs do not establish the authority of the State Auditor or the State Board of Education to recover possession of the instructional materials and equipment. Ohio Revised Code Sections 117.09 and 117.10 speak for themselves and not only permit but require the State Auditor to take appropriate steps to terminate the unlawful expenditure of State funds and the unlawful use of public property. And Section 3301.07 of the Revised Code provides ample authority on the part of the State Board of Education to compel the necessary reporting and accounting to facilitate the return of the equipment and materials. If the State defendants were genuinely desirous of ending these unconstitutional loans it defies belief that Ohio statutory law would deny them the authority to do so.

The State defendants also assert that the Eleventh Amendment prevents the District Court from compelling these State officers to perform their official functions. Id. The very cases cited by these defendants in

furtherance of that argument, Dugan v. Rank, 372 U.S. 609 (1963) and Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1974), affirm that the Eleventh Amendment does not bar affirmative relief against a State officer who engages in conduct which violates the United States Constitution.

Finally (at page 7 of their motion), the State defendants urge that the plaintiffs are, in effect, asserting the rights of the public school districts in seeking the termination of the loans, and that since the amounts realized from an auction of the materials might not be sufficient to justify the expenses of sale, the local school districts should not be compelled to conduct those sales.

As to the former point, the plaintiffs are not asserting the rights of the public school districts when they seek the termination of loans which violate the Establishment Clause and therefore infringe upon the personal rights of the plaintiffs to be free from an establishment of religion by the instrumentalities of the State of Ohio. As to the latter point, there is no factual record to support the assertion of these defendants that the only buyers would be the

nonpublic schools, or that the price offered would be insufficient to cover the expenses of sale.

The alternative to granting the relief sought by the plaintiffs is clearly to permit the proponents of governmental aid to nonpublic religious schools that "one bite" under an unconstitutional statute, which this Court refused to grant them in New York v. Cathedral Academy, 434 U.S. 125, 130 (1977). The conversion of an unconstitutional lending scheme into an unconstitutional grant of equipment and materials to religious institutions at taxpayer expense cannot be tolerated. The decision of the District Court should be reviewed and reversed.

III. Brief in Opposition to Motion to Affirm of Appellees James Grit, et al.

The defendant parents and next friends of children enrolled in sectarian nonpublic schools urge that the "practical realities" of the case require that the materials and equipment loans to sectarian nonpublic schools in Ohio remain outstanding indefi-

nitely notwithstanding the First Amendment violation involved in that result. These defendants refer to the depreciated or near-obsolescent condition of the property (Motion to Affirm, pp. 5 and 6). However, no factual record was presented or considered on this motion. In fact, a determination of the condition of the equipment and materials could be made only by ordering an audit and accounting for what is on loan inasmuch as there has been no central collation of this information (the record on appeal in this Court in Wolman v. Essex, No. 76-496, was based upon a survey of six school districts, as exemplified by exhibit D of the stipulated record, appendix pages 67-71).

These defendants, like the State defendants, conjure the picture of local public school districts causing inventories of the loaned equipment and materials to be taken, and their subsequent auction sale, with the possibility of the nonpublic schools themselves might be the ultimate buyers, as if it were a horrible specter (Motion to Affirm, p. 8). Even if this untested prediction proves true, there is nothing inequitable about compelling this demise for programs which, given the Establishment Clause, should

never have been enacted. Nor is there anything inequitable in the purchase of these items by the nonpublic schools.

The defendants have yet to point out how they in any sense relied to their detriment upon the enactment of Section 3317.06. They have yet to illustrate how they can be likened to the defendants in Lemon II who, at least arguably, counted upon reimbursement for the purchase of instructional materials which they might not have purchased but for the unconstitutional reimbursement scheme in question. See, Lemon v. Kurtzman, 411 U.S. 192 (1974).

These defendants also seek to shrug off the applicability of New York v. Cathedral Academy, 434 U.S. 125 (1977) (Motion to Affirm, p. 10) by urging that the issue in that case was merely whether the New York legislature could modify the district court's decree by enacting a reimbursement statute after the District Court had struck down the reimbursement program. However, it is clear that in Cathedral Academy, this Court announced limits to any sweeping application of the result in Lemon II to all unconstitutional parochial assistance programs. The considerations which caused

this Court to uphold a retroactive injunction in Cathedral Academy required the reversal of the decision below which refused even prospectively to terminate unconstitutional lending of equipment and materials where there was not even any detrimental reliance upon the unconstitutional program on the part of the defendants.

IV. The Appropriate Exercise of Federal Equity Jurisdiction Requires Injunction Against the State Defendants

In another context, also involving unconstitutional activity in State educational processes, this Court has described the power of the District Court to remedy constitutional infringements.

> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971).

While Swann was, of course, a desegregation case, this court was explicit in its admonition that the equity jurisdiction which

it described in such cases was not different from the general injunctive powers of federal courts.

> "This allocation of responsibility once made, the Court attempted from time to time to provide some guidelines for the exercise of the district judge's discretion and for the reviewing function of the courts of appeals. However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." Id. at 15-16 (emphasis added)

> "As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." Id. at 16.

The Establishment Clause is hardly the stepchild of the Bill of Rights. A district court should have as much authority to compel the eradication of programs which violate the religion clauses as to compel the eradication

of programs which violate the Equal Protection Clause. The untested hypothesis of the court below that the termination of the unconstitutional loans of equipment and materials might fail to realize substantial profits for the State is hardly a reason to permit those loans to continue. That decision should be reviewed by this Court.

Conclusion

Plaintiffs-appellants urge that this Court note probable jurisdiction and set this appeal for plenary review.

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